Zegelstein v Faust
2017 NY Slip Op 31257(U)
June 9, 2017
Supreme Court, New York County
Docket Number: 651198/2014
Judge: Anil C. Singh

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: PART 45

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RICKY ZEGELSTEIN, M.D., CUSTOM ANESTHESIA SERVICES, P.C., and INNOVATIVE ANESTHESIA SOLUTIONS, P.C.,

Plaintiffs,

-against-

MICHAEL J. FAUST, M.D., MICHAEL P. KRUMHOLZ,, M.D., JED KAMINETSKY, M.D., ALAN RAYMOND, M.D., HAROON CHAUDHRY, M.D., and VCARE, LLC d/b/a M.D. MANAGE, INC.,

Defendants.

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DECISION AND ORDER

Index No. 651198/2014

HON. ANIL C. SINGH, J.:

Plaintiffs move for: a) an order restoring this matter to the trial calendar; b) a decision on plaintiffs' previously submitted cross-motion made pursuant to CPLR 306-b allowing an extension of time to serve a summons and/or complaint upon good cause shown or in the interest of justice in accordance with the decision of the Supreme Court, Appellate Division dated January 10, 2017; and c) leave to amend the complaint pursuant to CPLR 3025. Defendants oppose the motion.

Plaintiffs commenced this action by filing a summons with notice on April 17, 2014. Plaintiffs retained new counsel on August 8, 2014, who filed a verified

complaint on August 13, 2014.

In a memorandum opinion dated April 27, 2015, this Court dismissed the complaint without prejudice as the affidavits of service showed that plaintiffs failed to serve a summons with notice on any of the defendants. In light of the Court's finding that jurisdiction was lacking, the Court dismissed the cross-motion pursuant to CPLR 306-b for an extension to serve the summons with notice. Plaintiffs appealed.

The Appellate Division held that this Court erroneously concluded that it lacked jurisdiction to entertain plaintiffs' cross-motion for leave to extend the time for service and to amend the complaint as a result of plaintiffs' failure to serve the summons with notice within 120 days of commencement, in violation of CPLR 306-b (Zegelstein v. Faust, 146 A.D.3d 499 [1st Dept., 2017]). Accordingly, the Appellate Division remanded the matter to this Court to exercise its discretion to decide whether an extension of time for service was warranted upon good cause shown or in the interest of justice (id.)

The verified complaint alleges the following facts.

Plaintiff Ricky Zegelstein, M.D., is an anesthesiologist and owner of plaintiffs Custom Anesthesia Services, P.C., and Innovative Anesthesia Solutions, P.C. (collectively, "plaintiffs" or "Zegelstein"). Plaintiffs are engaged in the

business of providing out-patient anesthesia services at other doctors' offices or at ambulatory surgical centers.

Defendant Michael J. Faust, M.D. ("Faust") is a gastroenterologist with a practice located at 345 East 37th Street in Manhattan. Defendant Michael P. Krumholz, M.D. ("Krumholz") is a gastroenterologist with a practice located at 111 East 80th Street #1C in Manhattan. Jed Kaminetsky, M.D. ("Kaminetsky") is a urologist with a practice located at 215 Lexington Avenue, 10th Floor in Manhattan. Alan Raymond, M.D. ("Raymond") is a gastroenterologist with a practice located at 480 2nd Avenue in Manhattan. Haroon Chaudhry, M.D. ("Chaudhry") is an anesthesiologist with a place of business located at 347 5th Avenue, Suite 1402 in Manhattan. Faust, Krumholz, Kaminetsky, Raymond, and Chaudrhy are referred to collectively as the "defendants" or "defendant physicians."

The complaint alleges that, beginning in 2002, Zegelstein entered into separate agreements (the "agreements") with the defendant physicians that Zegelstein would provide in-office anesthesia services to patients being treated by the defendant physicians at their respective offices. The anesthesia services were provided by Zegelstein personally or by physicians affiliated with her, pursuant to individual employment or independent-contractor arrangements.

The agreements provided for Zegelstein's billing health insurance companies (the "insurers") and/or patients (if uninsured or for balances owed after insurance payments were made) separately from the defendant physicians. Billing for services were allegedly rendered to the patients from June 2007 through 2011.

Zegelstein contends that insurer/patient funds were deposited into accounts of the defendant physicians and converted by them. Further, Zegelstein contends that the defendant physicians concealed their actions, and Zegelstein did not begin to learn of their alleged theft of Zegelstein's fees until approximately mid-2012.

As a result of the defendants physicians alleged false representations to insurers and patients, Zegelstein asserts that she has been unable to bill properly for services provided. Commencing in 2012, upon discovery of defendants' concealment, in addition to Zegelstein's inability to know that insurers maintained false listings for their address and phone number owing to defendant physicians' misrepresentations as to their fictitious affiliation with Zegelstein, Zegelstein's collection efforts were frustrated and hindered by her inability to obtain complete claims payment information from insurers.

The verified complaint alleges eight causes of action: 1) conversion; 2) negligence; 3) breach of fiduciary duty; 4) unjust enrichment; 5) fraud; 6) breach

of contract; 7) an accounting; and 8) action for monies had and received.[1]

Discussion

Service of a summons with notice must be made within 120 days after the commencement of the action (see CPLR 306-b). "If service is not made upon a defendant within the time provided in this section, the court, upon motion, shall dismiss the action without prejudice as to that defendant, or upon good cause shown or in the interest of justice, extend the time for service" (CPLR 306-b). Here, it is undisputed that service of the summons with notice was not made on defendants within 120 days after the action was commenced by the filing of the summons with notice.

Whether to grant such an application is left to the court's sound discretion (Deutsche Bank, AG v. Vik, 2017 WL 1401221 (1st Dept., 2017). To establish good cause, plaintiffs are required to demonstrate that they exercised reasonably diligent efforts in attempting to effect proper service of process on the defendants (Brown v. Sanders, 142 A.D.3d 940, 941 [2d Dept., 2016]).

To determine whether an extension is warranted in the interest of justice, the Court may consider any relevant factor, including whether plaintiff has established

[1]At oral argument, plaintiffs' counsel stated that the negligence and accounting claims are withdrawn.

reasonably diligent efforts at service; expiration of the statute of limitations; the meritorious nature of the cause of action; the length of delay in service; the promptness of a plaintiff's request for the extension of time; and prejudice to defendant (Leader v. Maroney, Ponzini & Spencer, 97 N.Y.2d 95, 105-106 [2001]. The Court may consider the lack of probative evidence offered as to the claim's merit, plaintiff's lack of diligence in prosecuting the action, and the vague allegations of injury (Johnson v. Concourse Village, Inc., 69 A.D.3d 410 [1st Dept., 2010]).

The timeline of events in this matter demonstrates an egregious lack of diligence by the plaintiffs. The action was commenced by the filing of the summons with notice on April 17, 2014. Approximately 113 days then elapsed until August 8, 2014, when plaintiffs retained new counsel. At that point, there were still 7 days to attempt service of the summons with notice, or promptly make a motion to extend the time to serve process. Upon taking over the case, diligent counsel would have discovered that its predecessor had failed to serve the summons with notice and would either have served the summons with notice within the next seven days, before the 120-day period for service passed, or, alternatively, would have filed a timely application for a CPLR 306-b extension.

At any point, plaintiffs could have filed a motion for an extension. It was

only after three of the defendants filed motions to dismiss that plaintiffs finally took action. On November 26, 2014, plaintiffs filed a cross-motion seeking an extension.

Where, as here, plaintiffs waited several months and have not demonstrated that they exercised reasonably diligent efforts in attempting to effect proper service of the summons with notice on the defendants, the Court in its discretion finds that good cause has not been shown.

Next, we turn to the issue of whether an extension is warranted in the interest of justice.

The first factor to consider is the statue of limitations. The statue of limitations for an action asserting breach of contract is six years (CPLR 213(2)). Generally, a breach of contract cause of action accrues at the time of the breach (Ely-Cruikshank Co. v. Bank of Montreal, 81 N.Y.2d 399, 402 [1993]).

The statute of limitations for unjust enrichment is also six years (CPLR 213(1)). Likewise, an action for monies had and received is governed by a six-year period (Schreibman v. Chase Manhattan Bank, 15 A.D.2d 769 [1st Dept., 1962]). "A cause of action based upon fraud must be commenced within six years from the time of the fraud, or within two years from the time the fraud was discovered, or with reasonable diligence could have been discovered, whichever is

longer" (Simpkins v. Mackey, 149 A.D.3d 1002 [2d Dept., 2017]). A three-year period governs a claim for conversion (CPLR 214(3)), as well as a breach of fiduciary duty action seeking monetary damages (Matter of Kaszirer v. Kaszirer, 286 A.D.2d 598 [1st Dept., 2001].

Paragraph 89 of the verified complaint alleges that the defendant physicians breached their respective contracts by diverting from plaintiffs the compensation plaintiffs were entitled to seek from the patients and/or insurers for their services (Verified Complaint, p. 15, para. 88). This allegation infers that plaintiffs' causes of action accrued on the dates when payments were diverted by the defendants. Although plaintiffs fail to plead specific dates, it is reasonable to assume that bills for services rendered by the plaintiffs were mailed to insurance companies and patients soon after the anesthesia services were provided. Even if the Court were to assume for the sake of argument that months went by before insurance companies and patients paid their bills, it is clear that any diversion of payments occurred many, many years ago. Accordingly, it is clear to the Court that plaintiffs claims are time-barred based on our analysis of the date of accrual of plaintiffs' causes of action.

Plaintiffs allege that their arrangements with defendant Faust covered the period from approximately 2003 to approximately 2011 (Verified Complaint, p. 5,

para. 22(a)). The action was commenced when the summons with notice was filed on April 17, 2014. Accordingly, the causes of action against Faust for conversion and breach of fiduciary duty are time-barred. Some of the claims for beach of contract, fraud, and unjust enrichment may also be time-barred.

Plaintiffs allege that the arrangements with Krumholz and Kaminetsky covered the period from approximately 2002 to approximately 2008, while the arrangements with Raymond covered from approximately 2004 to approximately 2008 (id.). Because six years passed between 2008 and the commencement of the action in 2014, the causes of action based on a three-year statue of limitations are completely time-barred, and the claims having a six-year statute of limitations may be partially time-barred.

The allegations against Chaudrhy are even more remote in time. Specifically, plaintiffs assert that Chaudrhy was an employee of the plaintiffs beginning in 2002 and ending in 2004 (Verified Complaint, p. 6, para. 27). Based on this time frame, all claims against Chaudrhy are time-barred.

The next factor to examine is whether plaintiffs have stated a meritorious cause of action. Had the agreements stated that plaintiffs would provide anesthesiology services to the defendants, and defendants would pay plaintiffs directly for the services rendered, it would be clear that a cause of action for

breach of contract existed if defendants failed to pay for the services. Here, however, the arrangement was not that simple. Instead, plaintiffs billed the patients and insurance companies, establishing a contractual relationship between plaintiffs and the insurance companies and between the plaintiffs and the patients. Under such circumstances, the allegation that defendants intercepted payments from patients and insurance companies does not really state a meritorious cause of action for breach of contract against the defendant physicians. Rather, the allegations are more in the nature of a cause of action for tortious interference with contract, or conversion. The complaint fails to allege a cause of action for tortious interference. Even had such a claim been asserted, it would clearly be time-barred. A three-year statue of limitations governs a claim for tortious interference with contract (CPLR 214). The claim accrues when an injury is sustained, not when the defendant's wrongful conduct occurs (IDT Corp. v. Morgan Stanley Dean Witter & Co., 12 N.Y.3d 132 [2009]). Although the precise date of the injury is not alleged, it must have been before 2009, rendering such a claim time-barred.

The next factor to consider is whether the allegations of injury are vague. Here, plaintiffs allege that the five defendant physicians diverted funds from insurance companies and patients over a period of several years. However, the complaint does not provide the name of any patients, the precise dates when

services were rendered by plaintiffs, or exact billing dates. Plaintiffs seek damages in the amount of $5,000,000 against the defendant physicians as if they were part of a single practice, despite sworn affidavits from the defendant physicians that they all maintain separate practices and have no affiliation with one another. Because the verified complaint lacks such facts, the allegations of injury are vague.

In Johnson, supra, another factor considered by the court was the lack of notice given of the claim for more than three years and three months. Here, there is a similar lack of notice. Zegelstein alleges that she did not begin to learn of the "deliberate theft" of plaintiffs' fees until mid-2012 (Verified Complaint, p. 11, para 61). However, Zegelstein then waited approximately two years to commence this action in 2014.

Finally, the delay in service has resulted in prejudice. Defendants were forced to incur the costs and legal fees associated with seeking dismissal of claims that expired years ago.

This matter is analogous to other actions where courts held that it would not be in the interest of justice to extend plaintiff's time to serve defendants.

In Yardeni v. Manhattan Eye, Ear & Throat Hospital, the plaintiff, acting pro se, filed a summons with notice on October 20, 2001, but never attempted to

serve either defendant hospital or defendant physician. The alleged medical malpractice occurred on May 13, 1999. The 2 ½-year statute of limitations expired on November 13, 2001, and the 120-day period for serving defendants (CPLR 306-b) expired on Monday February 18, 2002. In or about January 2002, plaintiff consulted an attorney, who purchased a new index number and filed a new summons and complaint on February 26, 2002, which were served on defendants in late February and early March 2002. Defendants served answers containing a statute of limitations defense in mid-March and early April 2002, and, after learning of the filing of the first action, moved to dismiss the first action for failure to make timely service and the second action as barred by the statute of limitations. On October 1, 2002, almost eight months after expiration of the 120-day period, plaintiff cross-moved for an extension of time in which to serve the summons and complaint under the "interest of justice" provision in CPLR 306-b. The motion court denied the cross-motion and dismissed both actions.

The First Department affirmed, holding that the motion court properly determined that it would not be in the interest of justice to extend plaintiff's time to serve defendants in the first action based upon the "inference of substantial prejudice" raised by defendants' lack of notice of that action until they were served with the summons and complaint in the second action in late February and

early March after the expiration of the statute of limitations (Yardeni, 9 A.D.3d at 297). Also, plaintiff did not cross-move for the CPLR 306-b extension until eight months after defendants were served in the second action, and then only in response to defendant's motion to dismiss (id.).

Here, Zegelstein acted just like the plaintiff in Yardeni, sitting back and waiting for the defendants to file a motion to dismiss, and only then seeking a CPLR 306-b extension by way of cross-motion.

Cases holding that plaintiffs failed to establish their entitlement to an extension of time for service where, as here, plaintiffs failed to seek an extension until after the defendant's motion to dismiss was made are variations on a common theme (Komanicky v. Contractor, 146 A.D.3d 1042 [3rd Dept., 2017]; Umana v. Sofola, 149 A.D.3d 1138 [2d Dept., 2017]).

On this record, the Court in its discretion finds that an extension of time for service of the summons with notice pursuant to CPLR 306-b is not warranted upon good cause shown or in the interest of justice. Accordingly, it is

ORDERED that the branch of the motion for an extension of time to serve a summons and/or complaint pursuant to CPLR 306-b upon good cause shown or in the interest of justice is denied; and it is further

ORDERED that the branch of the motion to restore the matter to the trial

calendar is denied as moot; and it is further

ORDERED that the branch of the motion for leave to amend the complaint pursuant to CPLR 3025 is denied as moot.

The foregoing constitutes the decision and order of the court.

Date: June 9, 2017
New York, New York

Anil C. Singh